

Jurisdiction in Internet privacy and defamation disputes

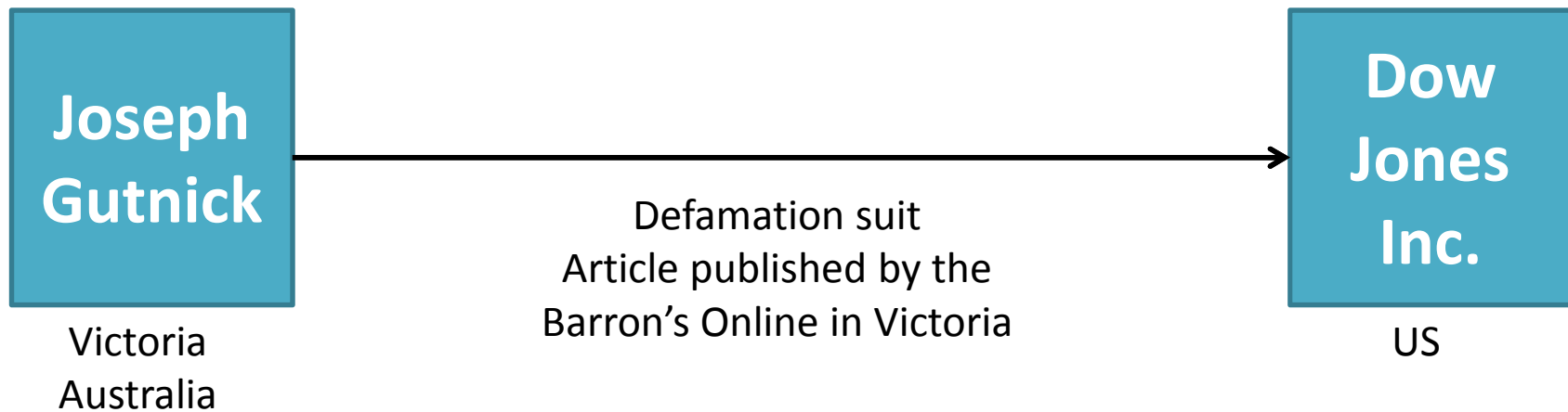
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Example of a leading case



Dow Jones v Gutnick, [2002] HCA 56

Roadmap

- 1) Context
- 2) Basic rules of jurisdiction
- 3) Defining the place of the harm

Defamation and Privacy

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 - Defamation / Privacy **vs** Personality torts
 - Criminal Law **vs** Civil Law
 - Freedom of speech **vs** Reputation
- Each State wishes to **protect and promote** its own standards

The Internet

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 - Lack of an entry barrier to global publishing

Part II

BASIC RULES OF JURISDICTION

Rules of jurisdiction

- Basic jurisdictional anchoring points
 - Domicile of the defendant (EU, Art. 4(1) BRIBis)
 - General jurisdiction (US, *Helicopteros*)
 - «Virtual stores?»

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 - FRA: Article 46 *Code de Procédure Civile*
 - ENG: Practice Direction 6B (9), Civil Procedure Rules
 - SUI: Article 129 PIL Act

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 - SUI: Article 129 PIL Act
 - US
 - Constitutional requirement of due process
 - Minimum contacts with the forum (*International Shoe*), or
 - Place of the harmful effects (*Calder v. Jones*)

Three Issues

- **Where** does the harm occur?
- **What link is required** between the harmful website and the forum?
- To what degree is the **intention of the publisher** relevant?

Part III

DEFINING THE PLACE OF THE HARMFUL EVENT

Accessibility approach

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- Abandoned in the US and in the UK, but still in force in EU law (*eDate*)

Zippo test

- Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997)
- “Something more” than mere accessibility should be required, jurisdiction should be *foreseeable*
- Sliding scale of active vs passive websites
- Abandoned and discredited

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- **However:** no set practice

Targeting Test (2)

- **U.S Targeting:** focused on the the **subjective intent** of the website owner
 - Young v. New Haven Advocate, 315 F.3d 256
 - Williams v. Advertising Sex (Unr.) 2009 WL 723168
 - Best Van Lines Inc. v. Walker 490 F.3d 239

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 - Best Van Lines Inc. v. Walker 490 F.3d 239
- Jurisdiction is almost always denied under this targeting analysis

Targeting Test (3)

- **In Europe:** use of the «targeting» for determining jurisdiction in cases of consumer contracts and IP torts
 - EU: ECJ, Pammer / Hotel Alpenhof, (C-585/08, C-144/09)
 - FRA: Cour d'appel de Paris, Normalu v Société. Acet, April 26 2006

Targeting Test (4)

- **EU Targeting:** focused on the **objective** foreseeable reach of the website
- Heightened importance of its features:
 - Language
 - Advertising
 - Revenue sources
 - Paid search engine rankings
 - TLDs...

Three Issues (?)

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The ECJ eDate decision



Establishment of
the publisher

Full damages

The ECJ eDate decision

Establishment of
the publisher

Full damages

Public
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Public
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Public
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Local damages only
No targeting

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